



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF J-M- INC.

DATE: APR. 17, 2019

**APPEAL OF NEBRASKA SERVICE CENTER DECISION**

**PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER**

The Petitioner, an IT services company, seeks to employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wages of all the beneficiaries of the Forms I-140, Immigrant Petitions for Alien Workers (I-140 petitions), it had filed.

On appeal the Petitioner submits additional evidence and asserts that the record now establishes its ability to pay the proffered wages of all the beneficiaries of its I-140 petitions (I-140 beneficiaries).

Upon *de novo* review, we will dismiss the appeal.

**I. LAW**

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. ANALYSIS

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date<sup>1</sup> of the petition onward. In this case the proffered wage is \$130,666 per year and the priority date is June 20, 2016. Since no annual report, federal tax return, or audited financial statement has been submitted for 2017, as required by 8 C.F.R. § 204.5(g)(2), we will restrict our analysis only to whether the Petitioner had the ability to pay in 2016, the year of the priority date.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, the record indicates that the Beneficiary began working for the Petitioner in February 2012, which was before the priority date. The record includes copies of the Forms W-2, Wage and Tax Statements, which the Petitioner issued to the Beneficiary for 2016. They show that the Beneficiary received "wages, tips, other compensation" totaling \$74,472 in 2016. Since the amount paid to the Beneficiary did not equal or exceed the proffered wage, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary. Nevertheless, we credit the wages paid.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current

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<sup>1</sup> The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. See 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, for 2016. If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation"). In this case, there are various deductions and other adjustments in Schedule K adding up to \$165,683, thus reducing the income reconciliation figure in line 18 to \$82,218. As for net current assets, the Petitioner had none in 2016. Net current assets (or liabilities) are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18 of Schedule K. In this case the Petitioner's current liabilities exceeded its current assets in 2016, resulting in net current liabilities of \$1,097,857. As indicated above, the Petitioner's net income is greater than the wages owed to the Beneficiary in 2016.

However, when a petitioner has filed other I-140 petitions, it must establish that its job offer is realistic not only for the instant beneficiary, but also for its other I-140 beneficiaries. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.<sup>2</sup> In this case USCIS records show that the Petitioner has filed multiple I-140 petitions. Therefore, the Petitioner must establish that its net income or net current assets in a given year are sufficient to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries, or the difference between their total proffered wages and the wages paid to them.

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<sup>2</sup> The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

In a request for evidence (RFE) in February 2018 the Director requested the Petitioner to submit a list of all I-140 petitions it filed during 2015 and in 2016, the name of each beneficiary, the proffered wage and priority date of each petition, documentation of the wages paid to these beneficiaries each year, the status of each petition (pending, approved, or denied), and whether any beneficiary had obtained lawful permanent resident (LPR) status. In response to the RFE the Petitioner in May 2018 submitted a chart listing 21 beneficiaries, including the instant Beneficiary, for whom it had filed I-140 petitions in 2015 and 2016, along with their priority dates, their prevailing wage<sup>3</sup> rates, the wages paid to them in 2015, 2016, and 2017 (corroborated with documentary evidence), and the status of each petition. The chart also indicated that nine of the petitions were approved or pending and that the other 12 petitions had been withdrawn. As evidence of the withdrawals the Petitioner submitted copies of letters to USCIS authored by itself and former counsel indicating that the subject petitions were withdrawn.

In his decision the Director noted that the Petitioner had not submitted a complete list of its I-140 beneficiaries, and identified four other I-140 petitions in USCIS records, by receipt number and name of beneficiary, which did not appear on the Petitioner's list. Absent any information about the priority dates, proffered wages, and the wages paid to those four beneficiaries, it was not possible for the Director to determine whether the Petitioner had the ability to pay the proffered wages of all of its I-140 beneficiaries. The Director cited the regulation at 8 C.F.R. § 103.2(b)(14), which provides that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. However, we note that the Director requested only a list of petitions filed in 2015 and 2016, and the four petitions cited in the denial were filed in 2017. Although not specifically requested in the RFE, these four additional petitions must still be considered when calculating the Petitioner's total wage burden.

On appeal the Petitioner augments the chart submitted in response to the RFE with information and corroborating documentation about the four additional I-140 petitions identified by the Director, including their receipt dates (all in 2017), priority dates, prevailing wage rates, wages paid to the beneficiaries in 2015, 2016, and 2017, and their status.<sup>4</sup> The amended chart now lists 25 I-140 beneficiaries, including the instant Beneficiary, and indicates that 13 petitions had been withdrawn and 12 were pending or approved at the time the chart was prepared. For the 12 pending and approved petitions the Petitioner provides the dollar amounts of its gross pay to the respective

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<sup>3</sup> The prevailing wage is a figure calculated pursuant to DOL regulations that represents the common rate of pay for a given job in a given geographical location. For a particular job opportunity in an I-140 petition the proffered wage must be at least equal to, but may also be greater than, the prevailing wage for the position. While the prevailing wage for a given position could be less than the proffered wage from the petitioner in an I-140 petition, in the instant petition the prevailing wage and the proffered wage are identical. For ease of calculation in this proceeding, we will assume that the prevailing wage and the proffered wage are the same in each of the other I-140 petitions.

<sup>4</sup> According to USCIS records, the Petitioner filed five additional I-140 petitions between June 2016 and March 2017, including receipt numbers [REDACTED] (approved), [REDACTED] (approved), [REDACTED] (denied), [REDACTED] (approved), and [REDACTED] (denied). Because information was not previously requested for these petitions, they do not inform our current analysis of the Petitioner's wage burden. However, in any future filings in this matter, the Petitioner must submit the requisite information regarding these and any other additional petitions

beneficiaries in 2015, 2016, and 2017, and indicates that these figures are drawn from each beneficiary's Form W-2, Wage and Tax Statement, for the respective years.

In some cases the gross pay figure on the Form W-2 is the same as "Reported W-2 Wages," while in other cases the "Reported W-2 Wages" are augmented by additional amounts. For 2016 specifically the "Reported W-2 Wages" were augmented for some of the beneficiaries by additional amounts for a cafeteria plan. In adjudicating employment-based immigrant visa petitions, USCIS will not add nontaxable benefits such as "cafeteria plans" to the wages actually reported to the beneficiary on Form W-2.<sup>5</sup> "The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage." *See* 20 C.F.R. § 656.10(c)(3). An employee's gross pay minus other nontaxable payments results in the "Reported W-2 Wages" on the Form W-2. *See* I.R.C. § 125. The "Reported W-2 Wages" are the same as the "wages, tips, and other compensation" entered in box 1 on the W-2 form. That is the figure utilized by USCIS in determining the petitioner's ability to pay the proffered wage to a beneficiary in a given year.

According to the Petitioner's chart, its total proffered wage obligation in 2016 to the 12 I-140 beneficiaries of petitions not subsequently withdrawn was \$1,399,154. For four of those beneficiaries the wages paid by the Petitioner exceeded the proffered wage. For the other eight beneficiaries the Petitioner's proffered wage obligation totaled \$989,248. Its wages paid to those eight beneficiaries in 2016 totaled \$748,893.76, which was \$240,354.24 below their cumulative proffered wages. Accordingly, the Petitioner's net income of \$82,218 in 2016 was not sufficient to cover the difference between the proffered wages and the wages paid to the eight I-140 beneficiaries. The deficit between the proffered wages and the wages paid to those eight I-140 beneficiaries was \$158,136.24

Thus, the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of June 20, 2016, through the end of 2016 based on its net income (or net current assets) in 2016.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the

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<sup>5</sup> A cafeteria plan is a written plan that allows employees to choose between receiving cash or taxable benefits instead of certain qualified benefits for which the law provides an exclusion from wages. *See* <http://www.irs.gov/pub/irs-pdf/p15b.pdf> (last visited Jan. 28, 2019). If an employee chooses to receive a qualified benefit under the plan, it is nontaxable if the benefits are excludable from gross income under a certain section of the Internal Revenue Code.

occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner states that it was incorporated in 1997 and had 72 employees at the time this petition was filed in 2016. The record includes copies of the Petitioner's federal income tax returns for the years 2013-2016, which recorded gross receipts of \$6,925,968 in 2013, \$8,150,968 million in 2014, \$8,569,764 in 2015, and \$9,571,407 in 2016, and expenditures for salaries and wages of \$418,699 in 2013, \$425,117 in 2014, \$1,031,601 in 2015, and \$1,116,951 in 2016. These figures indicate that the Petitioner's business volume grew approximately 40% and its expenditures for salaries and wages nearly tripled over that four-year time period. Considering the substantial gap between the proffered wages and the wages paid to eight of its I-140 beneficiaries in 2016, however, it appears that the Petitioner's receipts were not sufficient to match its proffered wage obligations. The Petitioner asserts that the compensation paid to its officers, which totaled \$347,500 in 2016<sup>6</sup> and somewhat more the previous year, could have been used to pay the proffered wages. While compensation of officers may be considered an additional financial resource of the Petitioner, no statement has been received from any officer stating that he or she was willing and able to utilize some, and if so, how much, of his or her officer compensation to help pay the proffered wages of the Petitioner's I-140 beneficiaries in 2016 and succeeding years. The Petitioner also indicates that its retained earnings, recorded as \$174,854 at the beginning of 2016 and \$226,097 at the end of the year,<sup>7</sup> could have been utilized to help pay the proffered wages of its I-140 beneficiaries. Retained earnings are a company's accumulated earnings since its inception less dividends. *See* Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, not the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings, in its ability to pay analysis.<sup>8</sup> Finally, the Petitioner claims that it "has established a strong business presence" in the information technology field and "plays an active role" in such activities as software development, data processing consulting, business process re-engineering, and enterprise resource planning. The Petitioner has submitted no documentary evidence of its reputation within IT industry, however, or any further evidence that it had the ability to pay the over \$150,000 shortfall between its prevailing wage obligation to eight I-140 beneficiaries in 2016 and the actual wages paid to those beneficiaries in 2016.

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<sup>6</sup> Compensation of officers was recorded on page 1, line 7, of the Form 1120S.

<sup>7</sup> Retained earnings were recorded on line 24, Schedule L, of the Form 1120S.

<sup>8</sup> Even if retained earnings were considered separately from net income and net current assets, they might not be appropriate to include in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business. Accordingly, they cannot properly be considered in determining the petitioner's ability to pay the proffered wage.

For the reasons discussed above, the Petitioner has not established its ability to pay the proffered wages of all of its I-140 beneficiaries from the priority date of the instant petition, June 20, 2016, onward based on the totality of its circumstances, as in *Matter of Sonegawa*.

### III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of June 20, 2016, onward. The appeal will be dismissed for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden

**ORDER:** The appeal is dismissed.

Cite as *Matter of J-M- Inc.*, ID# 2751717 (AAO Apr. 17, 2019)